

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

CITY OF LAKEWOOD,

Appellant,

v.

MARY ELIZABETH NORMAN,

Respondent.

No. 33104-7-II

UNPUBLISHED OPINION

Armstrong, J. – The City of Lakewood appeals a superior court order reversing Mary Elizabeth Norman’s Lakewood Municipal Court conviction for driving under the influence of intoxicating liquor (DUI). We reverse the superior court and reinstate the conviction.

**FACTS**

Mary Norman was charged in Lakewood Municipal Court with DUI. Norman pleaded not guilty, and the case went to a jury trial.

At trial, Officer Mark Rettig, formerly a safety officer for the town of Steilacoom, testified that he first encountered Norman at approximately 3:00 a.m., on September 27, 2002, parked at an angle in the middle of an intersection in the City of Lakewood. When he investigated the vehicle and activated his patrol car’s lights, Norman turned the vehicle around and sped away, driving on the wrong side of the road. She pulled over after Rettig activated his siren, and when

Rettig contacted her he smelled a strong odor of “intoxicants,” observed that her face was flushed and her eyes were red, and noticed that she fumbled with the paperwork he requested from her and appeared to have trouble identifying it. Clerk’s Papers (CP) at 141. These factors, along with Norman’s responses to his questions and her admission she had had two drinks earlier that evening, suggested to Rettig that Norman was driving while under the influence of alcohol.

When Norman refused to take a field sobriety test, Rettig arrested her for DUI and took her to the police station. While at the police station, her odd behavior continued, and Rettig testified that her behavior was consistent with someone who was “obvious[ly]” under the influence of alcohol. CP at 153.

The jury also watched a video of the traffic stop taken by a camera in Rettig’s car. During cross-examination, defense counsel tried to impeach Rettig’s testimony by pointing out inconsistencies between his testimony and the events depicted on the video. Additionally, later testimony suggested that on the tape Norman stated she told Rettig she had three rather than two drinks. During her testimony, Norman asserted she told Rettig she had three drinks in front of her but that she only drank two. The video tape is not in the record on appeal.

In contrast to Rettig’s testimony, Steven Oars, Norman’s former boyfriend, testified that when he picked Norman up from the police station at about 4:30 a.m., she appeared to be upset and to have been crying and that her eyes were red and puffy, which he believed was caused by her crying for a couple of hours. He further testified that he did not smell alcohol on her breath, that he did not recall if she appeared flushed, and that she seemed upset rather than intoxicated.

Norman’s testimony also contradicted Rettig’s. Although she admitted that on the night of the incident she had been out with friends and that she had consumed two glasses of beer, she testified that she was not parked in the

intersection or driving or behaving in a way that would suggest she was intoxicated and that she stopped immediately when she noticed Rettig's lights behind her. She admitted, however, that she may have been "somewhat distracted" while in the intersection because she was trying to use her cell phone. CP at 236. And she also admitted she did not tell Rettig that she was checking her phone while in the intersection.

After the parties rested but before closing argument, the trial court read the jury instructions to the jury. Instruction 1 provided in part:

You are the sole judges of the credibility of the witnesses and what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interests, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

CP at 264-65.

In closing argument, the prosecutor compared the State's and Norman's evidence, emphasizing that the State's evidence supported the conclusion that Norman had been intoxicated. In response, Norman's counsel argued that Norman's evidence was more consistent with what the jury saw on the video tape and that Rettig's testimony was not credible.

The prosecutor then argued that the jury should be cautious when evaluating Norman's evidence because neither Oars nor Norman was unbiased and because Rettig's version of the events, taken as a whole, was more consistent and therefore more credible. He concluded:

I ask you once again to view this case in its entirety. Look at all the facts and circumstances and not just pick, pick each one out and then decide, oh well, gee,

this, this could be this and this could be this and this could be this. And (unintelligible), and I want you to look at who was the one who was, who was (unintelligible) paying attention that night. (Unintelligible) the officer is the one who is paid to look out for drunk drivers, to look out for people who are (unintelligible) and what possible bias has been shown today? What special interest in this case has been shown? Why would he even come in here and just make up something? That makes absolutely no sense. (unintelligible) to come here and risk their whole career on some . . .

CP at 288-89.

At this point, defense counsel objected and the following discussion followed:

[Defense Counsel]: Your Honor, I object. I would object to (unintelligible) improper inference that (unintelligible) is an improper argument to state that the defendant . . . cannot be found not guilty simply by . . . believing the officer to be a liar.

[Prosecutor]: That's not exactly what I stated your Honor. I just, I made inference based on fact that there is no evidence suggesting that Officer Rettig made this thing up, I mean that's . . . a plausible inference and it's, it is proper.

CP at 289.

Without prompting from either party, the trial court immediately responded:

Um, the jury should, should interpret the remarks of [the prosecutor] only that he's, uh, vouching for the, uh, trying to bolster the credibility of his, uh, witness based upon issues of bias and, uh, now limit your considerations to his remarks to that.

CP at 289. Defense counsel thanked the trial court for cautioning the jury, and the prosecutor continued his argument, again contrasting the conflicting testimony and suggesting that the jury should find the State's evidence more credible.

The jury found Norman guilty of DUI. Norman appealed the conviction to the Pierce County Superior Court, arguing, *inter alia*,<sup>1</sup> that the prosecutor committed misconduct by (1)

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<sup>1</sup> The other issues Norman raised in her appeal to the superior court are not at issue on appeal.

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expressing his personal opinion of or vouching for Rettig's credibility; or (2) "arguing that to believe defendant's testimony, which contradicts the testimony of police officers, the jury must conclude the officers are lying." CP at 1-12. She further argued that the trial court's caution to the jury compounded rather than cured the problem.

In an oral ruling, the superior court stated:

I do agree that [the municipal court's] attempt at curing a defect only compounded the problem. [The court] is basically specifically saying that the jury should interpret the remarks of [the prosecutor] as vouching for the credibility of his witness and that, I think, is borderline of impermissible. If the Court had given the right instruction, I think that this wouldn't be here. So, I am going to reverse the conviction, but I'm sending this back down, and you can retry it.

Report of Proceedings (RP) at 4-5.

In amending the last portion of the proposed written order, the superior court further commented:

What I'll add is, "The error in Counsel's closing could have been corrected with proper instruction from the Court and was not." I mean, usually what you do is you just tell the jury that they are the sole judges of credibility and any arguments made by counsel are simply argument, pretty much reciting the instructions verbatim.

RP at 6.

The superior court's written order ultimately read:

This court, having reviewed the record in this case on appeal from the Lakewood Municipal Court, and having reviewed pleadings and heard arguments of the parties finds as follows: That Defendant's conviction is reversed and remanded based on error in the closing argument of the City and the curative instruction of the court. The error in counsel's closing could have been corrected with proper instruction from the court, and was not.

CP at 340.

Lakewood appeals the superior court's reversal.<sup>2</sup>

## ANALYSIS

### I. Prosecutorial Misconduct

Lakewood argues that the superior court erred when it found that the prosecutor's argument was improper. It contends that the prosecutor's statement was proper because it merely emphasized that the jury should consider the witnesses' potential interest, bias, or prejudice when determining what weight to give the testimony and it did not express a personal opinion or infer Norman could only be acquitted if Rettig was lying. We agree.

To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (citing *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). It is improper for a prosecutor to assert a personal opinion about a witness's veracity or to argue that in order to believe the defendant's evidence the jury must believe that the testifying officers are lying. See *State v. Fiallo-Lopez*, 78 Wn. App. 717, 730, 899 P.2d 1294 (1995) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)); *State v. Barrow*, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991). But, "[t]he prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *Fiallo-Lopez*, 78 Wn. App. at 728. We review allegedly improper argument in the context of the total argument, issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

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<sup>2</sup> Lakewood originally filed a notice of appeal of the superior court's decision. We converted the notice of appeal to a notice for discretionary review. A commissioner of this court initially denied review, but we granted Lakewood's motion to modify that ruling and accepted review.

Here, taking the prosecutor's comments in context, his comments were not improper. Counsel may comment on a witness's credibility as long as he does not express it as a personal opinion and does not argue facts outside the record, *State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985), and improper vouching occurs only when "it is 'clear and unmistakable' that counsel is expressing a personal opinion." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). Here, the prosecutor was comparing the witnesses' testimony and arguing that due to their direct involvement in the case the defense witnesses potentially had a strong interest in the outcome of the case and were potentially biased but that the evidence did not suggest that Rettig was interested, biased, or prejudiced. At no point did the prosecutor express his *personal* opinion about Rettig's credibility; he related his argument solely to the evidence that was presented.

Nor did the prosecutor assert that the only way Norman's evidence could be credible is if the jury determined that Rettig was lying. Again, his argument was merely an attempt to walk the jury through a credibility analysis based on the facts in the record, something the trial court had already advised the jury that it was their responsibility to do. Because the prosecutor's argument was based on admitted evidence and reasonable inferences drawn therefrom, this argument was not improper, and the superior court erred to the extent it found this argument to be error.<sup>3</sup>

## II. Curative Instruction

Because we conclude above that the prosecutor's comment was not error, we must also examine whether the trial court's "curative" instruction to the jury altered the innocuous nature of

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<sup>3</sup> Because we conclude that the argument was proper, we do not address whether the superior court erred by not determining whether this alleged error was prejudicial.

the prosecutor's argument.<sup>4</sup> We conclude that it did not.

Although inartful, taken in context, the trial court's instruction to the jury can reasonably be read to direct the jury to consider the prosecutor's argument solely as asking the jury to consider certain factors in the record that might suggest bias when evaluating the witnesses' credibility and the weight of their testimony. First, the trial court gave the instruction immediately after the prosecutor explained that his argument was only intended to point out to the jury that nothing in the record suggested Rettig was not truthful or that he had reason to fabricate his testimony. Second, as discussed above, the prosecutor's argument focused on the factual matters in the record necessary to the jury's credibility determinations and did not suggest that the prosecutor was actually vouching for Rettig's veracity or asserting that the only way Norman's evidence could be true is if Rettig was lying. Given this, it was error for the superior court to find that the trial court's curative instruction was prejudicial error.

Accordingly, we reverse the superior court and reinstate the municipal court conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Armstrong, J.

We concur:

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<sup>4</sup> For purposes of this discussion, we presume that Norman preserved this alleged error for review.

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Quinn-Brintnall, C.J.

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Penoyar, J.